

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOMOTIVE BODY PARTS
ASSOCIATION,

Plaintiff,

HON. LAURIE MICHELSON

v.

No. 15-10137

FORD GLOBAL TECHNOLOGIES,
LLC.,

Defendant.

MOTION HEARING

Monday, July 6, 2015

- - -

APPEARANCES:

For the Plaintiff:

PAUL KITTIGER, ESQ.
Assistant U.S. Attorney

For the Defendant:

MARK LORELLI, ESQ.

- - -

To Obtain Certified Transcript, Contact:
Ronald A. DiBartolomeo, Official Court Reporter
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 238
Detroit, Michigan 48226
(313) 962-1234

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

I N D E X

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page

Motion hearing

4

1

E X H B I T S

2

IdentificationOfferedReceived

3

4

N O N E

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Detroit, Michigan

2 Monday, July 6, 2015

3
4 - - -

5 **THE CLERK:** Court calls Case Number 15-10137,
6 Auto Body Parts Association versus Ford Global
7 Technologies, LLC.

8 Counsel state your appearances for the record.

9 **MR. KITTIGER:** Paul Kittiger for Auto Body
10 Parts Association.

11 **MR. LORELLI:** Mark Lorelli of Brooks Kushman
12 for Ford Global Technologies. Also present with me is
13 Linda Mettes and Amy Leshan, also of Brooks Kushman.

14 **THE COURT:** Okay. Good afternoon. You may
15 be seated.

16 I have to figure out how I'm to go to start.

17 Mr. Kittiger?

18 **MR. KITTIGER:** Yes.

19 **THE COURT:** How familiar are you with the
20 case?

21 **MR. KITTIGER:** I'm very familiar with the
22 case.

23 **THE COURT:** Okay. This case was transferred
24 from the Eastern District of Texas. What's the status
25 that the -- plaintiffs indicated they will file a

*15-10137; AUTOMOTIVE BODY PARTS ASSOCIATION v. FORD GLOBAL
TECHNOLOGIES, LLC.*

1 mandamus. What's the status of that?

2 **MR. KITTIGER:** In lieu of the mandamus, we
3 filed a motion before this Court for dismissal based on
4 inappropriate transfer, which we think is premature, and
5 in violation of local Texas rules. There were somewhat
6 procedurally complex matters in that transfer of venue.

7 **THE COURT:** Hold on. We'll get to that.

8 I just procedurally want to have a sense of where
9 you are, and what I should be ruling on vis-a-vis, what
10 the court of appeals might be ruling on.

11 So I took to mean that you would not be seeking
12 mandamus because yes, you filed in front of this Court a
13 motion to dismiss for lack of jurisdiction.

14 So is that a safe assumption that you're not
15 seeking mandamus?

16 **MR. KITTIGER:** We're not seeking a mandamus
17 petition arising out of the Texas case at this point, but
18 depending how is this Court rules, my client may or may
19 not seek mandamus.

20 **THE COURT:** Okay. So the record is clear,
21 this case was transferred here from the Eastern District
22 of Texas. At the time of the initial transfer, the
23 plaintiff indicated that they intended to seek mandamus
24 with the Court of Appeals. Frankly, to be honest, I don't
25 know whether that's would be the Fifth Circuit or the

1 Federal Circuit because it's not a patent issue. It's a
2 procedural issue, and we've been waiting, and that did not
3 happen. A mandamus petition was not filed. Certain
4 things have been filed in connection with this case here,
5 and virtually every turn the plaintiff has raised, the
6 issue is whether this Court has jurisdiction.

7 Then as Mr. Kittiger indicated, subsequently they
8 have filed a motion to dismiss for lack of jurisdiction.

9 There's also pending before me a motion to modify
10 the protective order that was filed by the defendants.
11 The briefing and response briefing the plaintiff again
12 raised that the Court does not have jurisdiction.

13 So clearly I need to resolve that issue first. So
14 that's what I intend to do today.

15 So Mr. Kittiger, let me ask you, because I have
16 your motion -- I don't yet have a response from the
17 defendants and I recognize that -- is there anything in
18 addition that you would like to articulate other than
19 what's contained in the briefing, and why don't you come
20 up to the podium if you would. Thank you.

21 **MR. KITTIGER:** In the briefing and the
22 context of the motion to dismiss on the personal
23 jurisdiction?

24 **THE COURT:** No, in connection with the motion
25 to dismiss for lack of jurisdiction for the improper

1 transfer.

2 **MR. KITTIGER:** I believe my motion says it
3 all. I mean, we have not received a response, but I don't
4 know what arguments we might raise in reply, what facts we
5 might emphasize in reply, but we contend that the
6 jurisdiction is improper for all the reasons stated in the
7 brief.

8 **THE COURT:** Tell me what's happening. As I
9 understand it procedurally, there are virtually identical
10 cases pending in the Eastern District of Texas and the
11 Northern District of Texas filed by the individual members
12 of the plaintiff group, is that correct?

13 **MR. KITTIGER:** There are declaratory actions
14 in the Northern District of Texas, which is filed by the
15 New World entity and then a different entity which not
16 parties to anyone here, which is National Auto Parts, and
17 that raises issues with respect to the Ford F150 hood and
18 headlamps, and then there's the Eastern District of Texas
19 case Auto Lighthouse Plus, and that case has not been
20 served.

21 **THE COURT:** Just give me in general, what's
22 the main difference between those cases and this case?

23 **MR. KITTIGER:** Those cases are brought by the
24 individual entity, which are members of the Automotive
25 Body Parts Association. This case was brought on an

1 associational standing theory where a different member
2 groups partnered together in context of marketing and
3 other functions as a trade association.

4 So as this action was filed, it raises the broad
5 defenses of -- or invalidity of defenses of functionality
6 and patent exhaustion.

7 **THE COURT:** And what about in those cases?

8 **MR. KITTIGER:** Those cases are declaratory
9 actions. I have not appeared or involved in those cases.
10 I can tell you what I told you already about the status of
11 those cases.

12 **THE COURT:** And let me be real direct about
13 it. Clearly, you don't want to be here, and since there's
14 virtually an identical case in the Eastern District of
15 Texas where you want to be, and maybe the Northern
16 District of Texas, why not dismiss this case and get
17 involved in those cases?

18 **MR. KITTIGER:** I mean, we sought dismissal of
19 this case based on the improper transfer.

20 **THE COURT:** Well, you want me to basically
21 retransfer, right, or do you want me to dismiss the case?

22 **MR. KITTIGER:** I mean, it's stated in the
23 briefing, either remedy, I think was raised in our request
24 for relief.

25 **THE COURT:** I guess I'm not thinking in terms

1 of sending this case back there. I'm thinking in terms of
2 for you all, why not get rid of this one and get involved
3 in the other ones, and deal with the same issues there?

4 **MR. KITTIGER:** That's certainly a good point.
5 I actually was not prepared to argue the jurisdiction
6 motion today. So it's not something that, you know, I'm
7 conversely with it, but I'm not particularly -- I didn't
8 study up on this over the weekend.

9 **THE COURT:** Is there any mystery here? What
10 happens if I send this back to Texas to Judge Mazzant?

11 **MR. KITTIGER:** Well, there were a variety of
12 motions that were dismissed based on the claim lack of
13 jurisdiction that we would request be resolved. I mean --

14 **THE COURT:** When he had ruled on the motion
15 to disqualify, he said I'm not going to do that. That he
16 ruled on. So you have motion for reconsideration.

17 **MR. KITTIGER:** Correct.

18 **THE COURT:** Is there any sense that Judge
19 Mazzant will reverse the ruling on the transfer?

20 **MR. KITTIGER:** Again, I think that the
21 transfer was improper. I think that the ruling on the
22 motion was improper. I think that the authorities we
23 cited in our brief were more consistent with the case law
24 developed by both the Fifth Circuit and Federal Circuit in
25 terms of where venue would be proper.

1 **THE COURT:** And why? Why doesn't the Midwest
2 court say that there is jurisdiction in the Court of
3 Appeals? If a case is transferred prematurely, the Court
4 of Appeals can deal with it.

5 **MR. KITTIGER:** It's our understanding that
6 the transfer of the case transfers the file, and then
7 jurisdiction goes with the possession of the physical
8 file. So that once the case was transferred, all be
9 improperly as we contend, the jurisdiction to appeal that
10 order has been lost because the jurisdiction came with the
11 file.

12 **THE COURT:** Is that what the Midwest court
13 said? That's your main case? Is that what they held?

14 **MR. KITTIGER:** Again, I have not read that
15 case in a while since we briefed it.

16 **THE COURT:** So then back to the main issue,
17 because I do agree that the main argument is this was
18 premature. The Eastern District of Texas has a local rule
19 that the clerk should have waited 21 days from the date of
20 the judge's ruling before transferring the case here.

21 So I'm just trying to get a sense of efficiency,
22 economy, and I'm trying to understand, do you all want me
23 to send this case back to Judge Mazzant to have him wait
24 21 days to then transfer it here again?

25 **MR. KITTIGER:** I would request that it be

1 sent back to him so he can rule on some of those motions
2 that were not ruled on for procedural reasons. I mean, in
3 some circumstance he might determine to send it back. I'm
4 not sure how he would work out those rulings, but under
5 the procedural rules we would be afforded time and notice
6 and hearing to be heard on that, and then we could seek
7 review of that ruling within the time period allowed.

8 **THE COURT:** So is that the primary relief
9 that the plaintiffs are seeking, to have the ability to
10 have review of the ruling on the motion to transfer?

11 **MR. KITTIGER:** It is. I mean, we spelled out
12 the relief that we requested in our brief as well.

13 **THE COURT:** Why can't you obtain that in this
14 Court?

15 **MR. KITTIGER:** Because I'm not entirely
16 certain to be perfectly candid. I was not prepared to
17 argue the jurisdiction motion today. I was prepared on
18 the motion to modify the protective order.

19 **THE COURT:** What would your argument be, that
20 I don't have jurisdiction to decide it?

21 **MR. KITTIGER:** That was one argument, but
22 there's also additional arguments in terms of not meeting
23 the standard of good cause, not meeting the standard of
24 reliance.

25 **THE COURT:** Right, the merits.

1 **MR. KITTIGER:** The merits.

2 **THE COURT:** But your first argument is going
3 to be I should not get to the merits because I don't have
4 jurisdiction.

5 **MR. KITTIGER:** Right.

6 **THE COURT:** So I would like to deal with the
7 jurisdictional, and certainly I think everybody understood
8 that probably I was going to have to deal with that.

9 All right. Anything further you would like to
10 add?

11 **MR. KITTIGER:** No.

12 **THE COURT:** Thank you.

13 **MR. KITTIGER:** Thank you.

14 **THE COURT:** Mr. Lorelli, I understand you all
15 have not briefed this issue, but I know it's due I think
16 in the next week or so. I sure it is something you have
17 given some thought to. Just in general what's the
18 defendant's position?

19 **MR. LORELLI:** Well, in general your Honor,
20 what was filed in the Eastern District of Michigan is bits
21 and pieces of the eight different briefs that were filed
22 in the Eastern District of Texas.

23 This Court has jurisdiction. I think the writ of
24 mandamus issue is a red herring. They have the ability --
25 this case, the agency that it was brought is a patent

1 case. It goes to the Federal Circuit whether it is here
2 or whether in Texas. The Federal Circuit has control over
3 this case in the appeals level.

4 **THE COURT:** And they will decide the transfer
5 of venue issue?

6 **MR. LORELLI:** They will decide a mandamus
7 motion. I have not seen -- and I have researched it
8 extensively -- but I have not seen a case that got
9 transferred and mandamus granted. A lot of cases,
10 especially from East Texas that didn't get transferred,
11 there was mandamus filed to the Federal Circuit, and the
12 Federal Circuit ordered the Texas court to transfer.
13 Those carry a big line of cases, the opposite.

14 So I've never seen a case that would say that
15 Judge Mazzant didn't have the ability and discretion to
16 transfer the case.

17 Actually it's interesting --

18 **THE COURT:** Nobody is arguing that. Clearly,
19 clearly he has the authority to issue the ruling that he
20 issued on the motion to transfer. The issue is did the
21 clerk's office transfer it before the expiration of the 21
22 days under their local rule?

23 **MR. LORELLI:** Judge Mazzant addressed that in
24 the order and said it was fine.

25 **THE COURT:** Why did he have jurisdiction to

1 issue that order?

2 **MR. LORELLI:** He had jurisdiction to issue
3 that order because he was directed to the Texas local
4 rules is probably the best answer that I have, your Honor.
5 It was directed to his order, although the case at that
6 time had been transferred.

7 Interestingly, and I think this goes into the pot
8 of stew, these two additional cases that were filed down
9 in Texas -- the first one was filed in East Texas -- Judge
10 Mazzant was drawn and decided not to serve it, and they
11 picked a different party, and filed it in North Texas to
12 get a different judge. This whole process smells, and we
13 would like to get the case moving in the appropriate
14 forum.

15 **THE COURT:** Sure. And I understand that. As
16 you all can see, I'm struggling. I've got very technical
17 legal issues on one side, but they are significant
18 important jurisdictional issues, and then I have the issue
19 of what's really going on here. I'm trying to conceive of
20 any way that this case doesn't come back to me, that what
21 goes back to Texas is a motion for reconsideration, and I
22 do think that issue can be dealt with here. I think the
23 plaintiffs have a right to move for retransfer. I think
24 they get that relief, but I've got to the deal with the
25 fact that a jurisdictional issue has been raised, and I'm

1 trying to figure out from your perspective what's your
2 sense of direction if I send this case back to Texas for
3 Judge Mazzant to fix it?

4 I agree he already indicated in his order, I
5 think, what he would do, send it back, or he waits 21
6 days, or he doesn't, or he says no, I'm not waiting. I
7 meant my order to mean immediate. I didn't use the word,
8 but that's clearly that's what I meant. I'm directing the
9 clerk to immediately transfer the case.

10 Then I suppose the plaintiff moves to stay that,
11 and there's appellate consideration or a motion for
12 reconsideration in front of the judge. None of us dispute
13 what Judge Mazzant would do. Plaintiffs argue we have a
14 right to see what he would do.

15 Is that consistent what you all think would happen
16 if I send it back to Texas, or what's your sense if I sent
17 it back to Texas?

18 **MR. LORELLI:** Well, my sense is that since we
19 got from the last order from Judge Mazzant, this case is
20 transferred, and he as not dealing with it anymore. I
21 think that's what the appeals court is there for. The
22 first time we talked on the phone, they said we're going
23 to file our writ of mandamus, and it's been almost three
24 months, and we're here now with the same briefing that was
25 already denied in Texas sitting before you, and I have not

1 had the opportunity to dive into that briefing, but it
2 doesn't change the facts that they filed a case in the
3 district that defendant was not there nor the plaintiff
4 was there. The case never belonged in East Texas, and we
5 finally get to a place where it belongs, and we're dealing
6 with eight motions for reconsideration or reconsider this
7 or take the same brief, call it something else, and file
8 it in a different court.

9 It's just frustrating your Honor, but I don't
10 think there a jurisdictional issue here. You have it. If
11 they want to object to that, they can go to the Federal
12 Circuit like they said three months ago.

13 **THE COURT:** Well, it gets back to the
14 question that I asked you before. If the case was
15 transferred prematurely, and the only way you can argue
16 that no, it wasn't, because Judge Mazzant intended the
17 order to mean immediate because he ruled in March, it was
18 after the case was transferred at the time when argument
19 can be made that he didn't have jurisdiction to issue that
20 ruling.

21 **MR. LORELLI:** If it goes back to him and he
22 says -- he waits 21 days to transfer it, denies all the
23 motions for reconsideration or that we obviously briefed
24 against because it didn't have any merit that the case
25 shouldn't be there.

1 I know you're dealing with procedural issues, but
2 whether Judge Mazzant issued that order on the
3 reconsideration is still I think irrelevant to this
4 Court's jurisdiction. The case was transferred.
5 Twenty-one days didn't pass.

6 **THE COURT:** Right. I guess you take the
7 hypothetical. Take a different hypothetical, and say
8 Judge Mazzant said oh, I didn't think the clerk was going
9 to transfer it so quickly. I meant for you all have the
10 21 days. Would I have jurisdiction?

11 **MR. LORELLI:** Would you have jurisdiction?

12 **THE COURT:** Because the case had been
13 transferred.

14 **MR. LORELLI:** Sure. Say if he didn't
15 intend -- well, okay, hypothetical, that he wanted 21 days
16 there. They filed a motion for reconsideration, but the
17 facts at the end of the day there's no party there. No
18 matter what they filed in their reconsideration motion and
19 all of the other motions they filed in front of the judge
20 doesn't change anything.

21 **THE COURT:** Well, sure. It gets denied.
22 That doesn't resolve the issue whether I have
23 jurisdiction. Those are separate issues.

24 **MR. LORELLI:** Again, leading to the same
25 result, but I understand where you're coming from.

1 **THE COURT:** Okay. Go ahead. Anything
2 further that you would like to add on this issue?

3 **MR. LORELLI:** On the jurisdictional issue no,
4 your Honor. We just would like to move ahead obviously.

5 **THE COURT:** Thank you. I understand.

6 Mr. Kittiger anything further you would like to
7 add?

8 **MR. KITTIGER:** Not on the jurisdictional
9 issue.

10 **THE COURT:** Okay. We're going to take a five
11 minute recess.

12

13 (Recess taken.)

14

15 (Proceedings resumed.)

16

17 **THE CLERK:** Recalling Case Number 15-10137,
18 Automotive Body Parts Association versus Ford Global
19 Technologies, LLC.

20 Would the parties restate their appearances on the
21 record?

22 **MR. KITTIGER:** Paul Kittiger for ABPA.

23 **MR. LORELLI:** Mark Lorelli of Brooks and
24 Kushman, along with Linda Mettes and Amy Leshan for Ford
25 Global Technologies, LLC.

*15-10137; AUTOMOTIVE BODY PARTS ASSOCIATION v. FORD GLOBAL
TECHNOLOGIES, LLC.*

1 **THE COURT:** Okay. Please be seated.

2 I appreciate your patients while we took some
3 additional time.

4 Counsel, I do recognize and appreciate here that
5 we noticed this for a hearing on Ford Global's motion to
6 modify the protective order, which is Docket 9.

7 As I indicated though in connection with that
8 motion, the plaintiff's raised the issue that this Court
9 lacks jurisdiction, and in the course of preparing for
10 this motion, I saw that argument and realized that I need
11 to deal with that as a threshold matter, and that is a
12 separate pending motion, the motion to dismiss. Let's see
13 if I have the exact title, which I do, Plaintiff's Motion
14 Requesting that the Court Decline Jurisdiction of This
15 Case, and Direct the Clerk to Transfer the Case File Back
16 to the Eastern District of Texas, which is Docket 17.

17 So while the parties were not here necessarily
18 prepared to argue that motion, certainly, they needed to
19 be prepared to do so because it is a threshold issue, and
20 so I am going to first address ABPA's claim that the Court
21 lacks jurisdiction over this case because the case
22 transfer from the Eastern District of Texas to the Eastern
23 District of Michigan was in violation of the Eastern
24 District of Texas Local Rule CV-83(b), and therefore
25 premature and void, and that's ABPA's motion to decline

1 jurisdiction, Paragraph 1.

2 On January 7, 2015, Judge Mazzant, M-a-z-z-a-n-t,
3 issued an order that says, quote, based on the foregoing,
4 the court finds that the defendant Ford Global
5 Technologies, LLC's motion to transfer venue to the
6 Eastern District of Michigan is hereby granted. The clerk
7 is directed to transfer this case to the United States
8 District Court for the Eastern District of Michigan, end
9 quote, and that's the Eastern District of Texas Docket
10 Number 62.

11 The case was then docketed in the Eastern District
12 of Michigan on January 14, 2015.

13 Eastern District of Texas Local Rule CV-83(b) says
14 in relevant part, quote, absent an order of the court to
15 the contrary, no sooner than the 21st day following an
16 order of the court transferring the case to another
17 district, or remanding it to the appropriate state court,
18 the clerk shall transmit the case file to the directed
19 courts, end quote.

20 Given that only one week passed before the
21 transfer, the Court can understand ABPA's argument that
22 the case transfer was premature. Indeed, ABPA received a
23 voice mail message from the clerk's office in Texas
24 indicating the transfer was premature and advising that
25 ABPA should, quote, file that motion to reconsider in the

1 case, and it will be ruled upon, end quote, and that's
2 Docket 17, Motion to Decline Jurisdiction at 10.

3 But the primary case relied on by the plaintiff,
4 Midwest Motor Express v Central State Southeast, 70 F.3d
5 1014, Eighth Circuit 1995, does not indicate that the
6 affect of an improper transfer is that this court, the
7 transferee court is without jurisdiction. It deals more
8 with whether the transferor court retains jurisdiction.

9 The concern -- and I understand the concern that
10 such an issue poses of whether two courts are exercising
11 jurisdiction over the same case at the same time.

12 As the Midwest court stated, quote, the rule that
13 jurisdiction follows the file, avoids the procedural and
14 jurisdictional snarl that would likely ensue if two courts
15 were simultaneously working on the same case. We need not
16 worry about any such conflicts here because the Northern
17 District of Illinois declined jurisdiction over the
18 transferred file, end quote, and that's Midwest 70 F.3d at
19 1016.

20 So that case the issue of simultaneous
21 jurisdiction was not a problem because the transferee
22 court declined jurisdiction.

23 Here, the transferor has said it is no longer
24 exercising jurisdiction. So I see no reason that this
25 Court lacks jurisdiction.

1 Alternatively, on April 2, 2015, Judge Mazzant
2 issued an order denying ABPA's motion to vacate. Judge
3 Mazzant stated that, quote, ABPA's reliance on Eastern
4 District of Texas Local Rule CV-83(b) was misguided as the
5 undersigned's memorandum order and opinion concludes just
6 such an order, directing the clerk to transfer this case
7 immediately to the United States District Court for the
8 Eastern District of Michigan, end quote, and that's
9 Eastern District of Texas Docket Number 93.

10 The April 2015 order relevant in two ways -- at
11 least two ways that I can see:

12 First, while the general rule is that jurisdiction
13 follows the file, and this case was docketed here before
14 Judge Mazzant issued his April 2015 order, I find that the
15 transferor court, i.e., Judge Mazzant, retained authority
16 to decide the limited issue of whether the transfer is
17 premature.

18 Such a decision is similar to a court deciding
19 whether it has subject matter jurisdiction. No one doubts
20 that even if the Court lacks subject matter jurisdiction,
21 it may decide threshold issues, such as complaint pleads a
22 federal question, whether the parties are completely
23 diverse, or whether the amount in controversy has been
24 satisfied. Indeed, in answering these questions, the
25 Court has authority to permit the parties to engage in

1 discovery directed toward jurisdictional issues.

2 And again, I'm going to point to the Midwest Motor
3 case. I believe that further supports this Court's
4 finding that Judge Mazzant had authority to decide whether
5 the transfer was premature. There, the Court of Appeals
6 for the transferor court ruled that the general rule that
7 jurisdiction follows the file is of questionable legal
8 effect where the file was transferred prematurely. The
9 critical point, however, for present purposes, is that
10 Court of Appeals for the transferor court had authority to
11 answer the question of whether the file was transferred
12 prematurely, that's Id. See also Emblaze, E-m-b-l-a-z-e,
13 versus Apple Inc., 2011 Westlaw 2419802, Southern District
14 of New York 2011, paren, quote, generally a decision
15 transferring is case can only be reconsidered or appealed
16 through a writ of mandamus if the petitioner acts prior to
17 receipt of the action's papers by the clerk of the
18 transferee court to file the petition for the writ or a
19 motion in the transferor court to stay the order.
20 However, there's an expectation to this rule where the
21 district court has acted hastily in transferring the
22 case's papers such that a diligent petitioner would be
23 precluded from seeking mandamus, end quote, end paren.

24 Although the Midwest court ultimately found that
25 the filed transferred prematurely, and Judge Mazzant

1 ultimately found here that the file in this case was not,
2 the Court does not believe the authority to answer the
3 question of premature transfer should turn on the answer.
4 When a court ultimately concludes that it lacks subject
5 matter jurisdiction, that does not render its decision on
6 that issue improper or without legal effect.

7 Accordingly, the Court finds that Judge Mazzant
8 had authority to answer the question whether the transfer
9 was premature.

10 As such, Judge Mazzant's finding that the
11 transfer was not premature, is entitled to great deference
12 from this Court as law of the case. See for example,
13 Christianson, C-h-r-i-s-t-i-a-n-s-o-n versus Colt,
14 C-o-l-t, 486 U.S. 800 1988, and this Court finds that it
15 cannot say that Judge Mazzant's conclusion that the file
16 was not transferred prematurely is clearly erroneous. The
17 Court appreciates that a reasonable litigant or clerk's
18 office employee might read Judge Mazzant's January 2015
19 transfer order as not directing immediate transfer. But
20 when Judge Mazzant specifically said, quote, the clerk is
21 directed to transfer this case to the United States
22 District Court for the Eastern District of Michigan, end
23 quote, this Court can understand how a clerk's office
24 employee might interpret that statement as requiring
25 immediate action, and Judge Mazzant has explained that he

1 intended his ordered to mean, quote, immediately, end
2 quote.

3 The Court also cannot say there's any manifest
4 injustice to ABPA from deferring to Judge Mazzant's
5 finding that the transfer was not premature. Judge
6 Mazzant has issued an R & R on the original briefing on
7 the motion to transfer. Then Judge Mazzant considered
8 ABPA's objections to his R & R and issued an order that
9 this case should be transferred here. There's no doubt --
10 or I should say little doubt about what Judge Mazzant
11 would do if this case was sent back to the Eastern
12 District of Texas, and this will be discussed in a moment
13 or two. ABPA is not without legal recourse giving it
14 review of the transfer decision.

15 Accordingly, I find that Judge Mazzant had
16 authority to answer the question of whether the transfer
17 was premature, and under the law of the case doctrine,
18 that decision was not fairly erroneous and is not
19 manifestly unjust to ABPA. As such, there's no reason for
20 me to decline to exercise jurisdiction, and ABPA's motion
21 will be denied nor that reason as well.

22 Alternatively, another alternatively, even if
23 Judge Mazzant's April 2015 order lacks the force of law
24 and thus the law of the case doctrine does not apply to
25 that order, I find that I have authority to amend Judge

1 Mazzant's January 2015 transfer order under Federal Rule
2 of Civil Procedure 60(a) to reflect his intent at the time
3 he issued that order.

4 Rule 60(a) says, quote, the court may correct a
5 clerical mistake or a mistake arising from oversight or
6 omission whenever one is found in a judgment, order, or
7 other part of the record. The court may do so on motion
8 or on its own, with or without notice, end quote.

9 The purpose is to allow district courts to
10 conform orders to reflect the court's intent at the time
11 of the order. See Sartin, S-a-r-t-i-n, versus McNair Law
12 Firm PA, 756 F.3d 259 at 265 and 266 Fourth Circuit 2014,
13 stating, quote, Rule 60(a) is not confined just to fixing
14 typographical or clerical errors. The rule's text also
15 authorizes a court to correct the mistake arising from
16 oversight or omission. Such a mistake occurs when there
17 is an inconsistency between the text of an order or
18 judgment, and the district court's intent when it entered
19 the order or judgment, citing cases from the Sixth, Ninth,
20 Federal and Tenth Circuit Courts of Appeals. See also
21 Garamendi, G-a-r-a-m-e-n-d-i versus Henin, H-e-n-i-n, 683
22 F.3d 1069 at 1078, Ninth Circuit 2012, quote, Rule 60(a)'s
23 touchstone is fidelity to the intent behind the original
24 judgment, end quote, In re Walter, 282 F.3d 434 at 441,
25 Sixth Circuit 2002, stating, quote, a court properly acts

1 under Rule 60(a) when it is necessary to correct mistakes
2 other oversights that cause the judgment to fail to
3 reflect what was intended at the time of trial, end quote.

4 Although it has been said that, quote, if an
5 error affects the substantive rights of the parties, it
6 must be corrected under the provisions of Rule 60(b), end
7 quote, and *Olle, O-l-l-e, versus Henry & Wright Corp*, 910,
8 F.2d 357 at 363 to 64, Sixth Circuit 1990, this statement
9 should not be interpreted strictly literally.

10 Consider this example, at oral argument on a
11 motion to transfer, the district judge explains how every
12 relevant consideration strongly favors transfer to the
13 Western District of Michigan, but then when the judge goes
14 to enter the corresponding order, he writes, quote, the
15 clerk is directed to immediately transfer this case to the
16 United States District Court for the Eastern District of
17 Michigan, end quote, inadvertently substituting Easter for
18 Western. And so the same day as the order is entered, the
19 clerk transfer the case to Western District. This would
20 be a clerical mistake within 60(a)'s plain language, even
21 if a correction of the order to reflect the judge's
22 manifest intent at oral argument would substantially
23 affect how the case would be litigated and thus, the
24 substantive rights of the parties.

25 More importantly, the Fifth Circuit, which the

1 Sixth Circuit relied upon in *Olle*, has recently clarified
2 this issue. In *Rivera, R-i-v-e-r-a, versus PNS Stores,*
3 *Inc.*, the Fifth Circuit acknowledged the case law
4 indicating that, quote, a judgment that affects the
5 substantive rights of the parties is beyond the scope of
6 Rule 60(a), end quote, but then explained, quote, the
7 relevant inquiry under Rule 60(a) is not whether making
8 the correction have any effect on the parties' rights and
9 obligations under the judgment. Most of the time it will.
10 Rather, the question is whether granting the motion would
11 require the district court either to adjudicate an issue
12 it has not previously reached or to make a substantive
13 modification to a prior adjudication. When the record
14 makes it clear that an issue was actually litigated and
15 decided, but was incorrectly recorded in or inadvertently
16 omitted from the judgment, the district court can correct
17 the judgment under Rule 60(a), even where doing so
18 materially changes the parties' positions and leaves one
19 party to the judgment in a less advantageous position.
20 That's 647 F.3d 188 at 198 to 200.

21 The Court finds that Judge Mazzant's April 2,
22 2015 order is the best evidence of what he intended when
23 he directed transfer to this Court on January 7, 2015.
24 Not only does Judge Mazzant say that his January 7, 2015
25 order that he, quote, directed the clerk to transfer this

1 case immediately to the United States District Court for
2 the Eastern District of Michigan, end quote, he also
3 explicitly finds that ABPA needed to seek a stay to have
4 delayed the transfer to this Court.

5 To the extent that ABPA would argue that this
6 Court lacks authority to clarify Judge Mazzant's
7 January 2015 order under Rule 60(a), this Court would
8 disagree.

9 There is case law indicating that a transferee
10 court can invoke Rule 60(a) to amend an order entered by
11 the transferor court. See for example, In re Platinum Oil
12 Properties, LLC, 465 B.R. 621 at 651, and that's the
13 District of New Mexico Bankruptcy Court 2011 stating,
14 quote, ordinarily, a motion to correct the mistake under
15 Rule 60(a) should be made to the court that rendered the
16 order or judgment, but it seems to this court that the
17 practical justification for this rule is that the
18 transferee court typically does not know the intent of the
19 transferor court, and that it is thus the transferor court
20 that is in the best or only position to invoke Rule 60(a),
21 and clarify the transfer order.

22 But here, as discussed, Judge Mazzant has made
23 his intent manifestly clear. In April 2015, he explicitly
24 said that his transfer order was intended to have
25 immediate effect.

1 Indeed, the Court doubts it lacks authority, for
2 example, to modify or vacate a scheduling or protective
3 order issued by a transferor court, should that court have
4 failed the vacate those orders prior to transfer.

5 Moreover, the Court notes that there's also case
6 law indicating that a transferee court can decide a motion
7 for reconsideration of the transferor court's transfer
8 orders. See, for example, *Hamilton versus Geithner*,
9 *G-e-i-t-h-n-e-r*, 2009 Westlaw 1683298, Eastern District of
10 Virginia, 2009. If a transferee court has authority to
11 grant that motion for reconsideration, and therefore,
12 modify or vacate or overrule the transferor court's
13 transfer order, then a fortiori, it has authority to amend
14 the transferor court's transfer order under Rule 60(a).

15 Accordingly, the Court finds that even if Judge
16 Mazzant did not have authority to decide whether the
17 transfer was premature, this Court finds that his
18 January 7, 2015 order was intended to and did require an
19 immediate transfer to this Court. As such, the transfer
20 was not premature, and the Court will not decline to
21 exercise jurisdiction.

22 So given that the Court has decided that this
23 case is properly before it, it takes this opportunity to
24 further clarify how this case will proceed procedurally,
25 and this also pertains to the issue of whether there is

1 any manifest injustice to ABPA.

2 The Court's research has revealed that, although
3 this Court does not sit as a Court of Appeals over the
4 Eastern District of Texas, it does have authority to
5 adjudicate a motion to transfer this case back to the
6 Eastern District of Texas, i.e., a motion to retransfer.
7 See *Moses versus Business Cards*, 929 F.2d 1131 Sixth
8 Circuit 1991, finding where the lower court determined
9 that it had, quote, the power to consider the motion to
10 retransfer, end quote, to the Northern District of
11 Alabama, but denied retransfer under the law of the case
12 doctrine, that the lower court's decision was not an abuse
13 of discretion. See also *Hill versus Henderson*, 195 F.3d
14 671 at 677 D.C. District 1999, stating, quote, a party
15 transferred against its will can indirectly secure at
16 least partial review of the transfer in the transferee
17 circuit by filing a motion for retransfer, the denial of
18 which is clearly reviewable by the Court of Appeals of the
19 transferee district, end quote.

20 Accordingly, the Court will grant ABPA leave to
21 file a motion to retransfer, and in so doing, the Court
22 reminds ABPA that its burdens is a heavy one. This Court
23 intends to treat Judge Mazzant's January 7, 2015 transfer
24 order as law of the case, and under that doctrine, Judge
25 Mazzant's order should continue to govern the same issues

1 in subsequent states of this case, end quote, and that's
2 the Sixth Circuit opinion in Moses, 929 F.2d at 1137.

3 Moreover, quote, because of the possibility of
4 forcing a transfer case into perpetual litigation by
5 playing jurisdictional ping-pong, the law of the case
6 doctrine applies with even greater force to transfer
7 decisions than to decisions of substantive law, end quote
8 and that's Id. to Moses. See also In re Cragar,
9 C-r-a-g-a-r Industries, 706 F.2d -- F.3d -- I'm sorry --
10 706 F.2d 503 at 505 Fifth Circuit 1983, stating, quote, if
11 the motion to transfer is granted and the case is
12 transferred to another district, the transferee district
13 should accept the ruling on the transfer as the law of the
14 case, and should not retransfer except under the most
15 impelling and unusual circumstances or if the transfer
16 ordered is manifestly erroneous, end quote. This policy
17 avoids the, quote, additional potential mischief of
18 tossing cases back and forth to the detriment of an
19 adjudication of the underlying merits of the case and
20 respect due sister courts, end quote. See also Scooter,
21 S-c-o-o-t-e-r, Store, Inc. versus Spinlife.com, 2010 U.S.
22 District Lexus 98124 Southern District of Ohio 2010, and
23 Stringfellow versus S.D. Warren Company, 1991 U.S.
24 District Lexus 16479, Western District of Michigan 1991.

25 The Court also briefly addresses ABPA's

1 assertion that, quote, if this Court declines jurisdiction
2 and orders the clerk to return the case file to the
3 Eastern District of Texas, then the Eastern District of
4 Texas will have jurisdiction to consider all the above
5 motions. If ABPA is dissatisfied with the rulings on the
6 motion to disqualify and the motions concerning the
7 transfer of venue, then ABPA can file a petition for writ
8 of mandamus against the Eastern District of Texas, and the
9 jurisdiction of the Federal Circuit will be clear, end
10 quote, and that's ABPA motion to decline jurisdiction at
11 24.

12 It appears that this Court need not decline
13 jurisdiction for ABPA to file a writ of mandamus directed
14 to Judge Mazzant. See Hill versus Henderson, 195 F.3d 671
15 at 677 D.C. Circuit 1991, stating, quote, a possible
16 explanation for finding transfer orders non-reviewable in
17 the transferee circuit is that such orders are usually
18 effectively subject to immediate review via mandamus in
19 the circuit of the transferring court, end quote, and NBS
20 Imaging, 841 F.2d at 297 to 298, Ninth Circuit 1998,
21 reiterating that the, quote, docketing of a case in an out
22 of circuit transferee court effectively completes a
23 Section 1404(a) transfer so as to deprive this Court of
24 appellate jurisdiction, end quote, but holding that the
25 court nevertheless had jurisdiction to issue a writ of

1 mandamus, quote, in extraordinary circumstances involving
2 a grave miscarriage of justice, end quote.

3 So in sum, Judge Mazzant's April 2015 order,
4 whether it be an order with force of law or merely
5 conclusive evidence of his intent on January 7, 2015,
6 combined with the facts that this case was transferred and
7 docketed with this Court, warrants denying ABPA's motion
8 requesting that the Court decline jurisdiction of this
9 case, and direct the clerk to transfer case file back to
10 the Eastern District of Texas.

11 I am going to issue an order to that effect, and
12 within 14 days of the entry of that order, ABPA may file a
13 mandamus petition and or motion to retransfer the case to
14 the Eastern District of Texas given I hope due
15 consideration to the issues raised in my ruling.

16 And so what I'm going to do counsel, I'm going
17 to adjourn the hearing and the ruling on the motion to
18 modify the protective order, given that there are still
19 some procedural issues on the transfer issue.

20 I agree with everybody that we need to move this
21 case along, and that is and was a threshold issue.

22 I also have a sense that if that resolves the
23 issue -- I don't know what the plaintiff is going to do --
24 but if it just means this case stays here, that might go a
25 long way toward resolving the motion to modify the

1 protective order, and by that I mean that this
2 jurisdictional issue may have been more of an impediment
3 on that motion than the actual merits. It might be
4 something that you all have the ability to work out,
5 because Mr. Kittiger, if I understand it, we're talking
6 about the same party providing the same discovery to the
7 same lawyers that they provided in the other case that's
8 pending in the Eastern District of Michigan.

9 **MR. KITTIGER:** It's different parties, your
10 Honor.

11 **THE COURT:** In terms of who they are seeking
12 the discovery from to modify the protective order, isn't
13 that the same party?

14 **MR. KITTIGER:** It's not.

15 **THE COURT:** And who is the different party?

16 **MR. KITTIGER:** This case is the ABPA versus
17 Ford Global. The other case is Ford Global versus New
18 World, Auto Lighthouse and UCC, which are three member
19 entities.

20 **THE COURT:** Right. They are different
21 plaintiffs, but the issue in the motion to modify the
22 protective order, as I understand it, is to use discovery
23 obtain knew world whether than redo you.

24 **MR. KITTIGER:** Ford requesting reuse some
25 discovery prior some knew world nonparty some of it was

1 ABPA.

2 **THE COURT:** So it would be using discovery
3 from New World and ABPA that the same lawyers have already
4 obtained from those parties.

5 **MR. KITTIGER:** They have obtained it in the
6 ABPA case.

7 **THE COURT:** Okay. All right. Let's see
8 where we are in the two weeks here with this
9 jurisdictional issue, and then I will reschedule the
10 hearing on the motion to modify the protective order if
11 that's not something that you all are able to work out,
12 and I believe we're also going to bring you in to have a
13 status conference to do a scheduling orders.

14 Okay. Anything further that anybody wants to put
15 on the record this afternoon?

16 Mr. Kittiger?

17 **MR. KITTIGER:** No, your Honor.

18 **THE COURT:** Mr. Lorelli?

19 **MR. LORELLI:** No, your Honor.

20 **THE COURT:** All right. Thank you.

21
22 (Proceedings concluded.)

23 - - -
24
25

C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

Ronald A. DiBartolomeo, CSR
Official Court Reporter

Date

- - -